No. 82-1325

IN THE

Supreme Court of the United States

October Term, 1982

I.A.M. NATIONAL PENSION FUND,

Petitioner,

vs.

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,

Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated, pursuant to Rule 22.6 of this Court, wish to bring to the Court's attention two cases, decided by the Ninth Circuit Court of Appeals since the Respondents filed their Brief In Opposition To Petition for Writ of Certiorari, which follow and expound upon *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648 (9th Cir. 1982).

The two decisions, *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, ___ F.2d ___, No. 82-4369, filed on March 22, 1983 and *Hurn v. Retirement Fund Trust of*

the Plumbing, Heating and Piping Industry of Southern California, ___ F.2d ___, No. 82-5032, filed on April 4, 1983 are reproduced in the Appendix to this Supplemental Brief at pages 1a-19a.

Respectfully submitted,
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APPENDIX

Edmund J. Harm, Plaintiff-Appellant, vs. Bay Area Pipe Trades Pension Plan Trust Fund, Defendant-Appellee.

No. 82-4369

United States Court of Appeals For The Ninth Circuit

[Filed on March 22, 1983]

Appeal from the United States District Court for the Northern District of California.

William H. Orrick, District Judge, Presiding. Argued and Submitted January 13, 1983.

Before: MERRILL, GOODWIN, and SNEED, Circuit Judges.

SNEED, Circuit Judge:

Appellant Edward Harm, a retired plumber, appeals from the district court's grant of summary to the Bay Area Pipe Trades Pension Plan Trust Fund. He filed a timely appeal and invokes our authority pursuant to 28 U.S.C. Sec. 1291. We affirm.

I.
FACTS

Harm, a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, retired in March 1977. Although he had worked as plumber for twenty-five years, he was only forty-five. He qualified for the Plan's service retirement benefit, which authorized employees who had not reached the normal retirement age of sixty-five to receive benefits if they had twenty-five years of credited service. He began receiving benefits of $605.82 per month.

In 1978 Harm moved from Northern California to Carson City, Nevada, where he became sole proprietor of a plumb-

ing business. Harm performed a variety of managerial tasks in his business, but he did not perform any of the fifty-one tasks in the union's work classifications. The Plan, learning of his activity, suspended his benefits on October 1, 1979. It claimed that its rules required it to suspend the benefits of any service retiree working in the pipe trades industry until the retiree became eligible for normal retirement benefits.

II.
DISPOSITION BY TRIAL COURT AND ISSUES ON APPEAL

Harm filed for declaratory relief, alleging that the suspension was invalid because his activity was not "work" in the pipe trades industry and so did not fall within the suspension rule. He also argued that any rule suspending benefits to service retirees working outside the Plan's geographic area violated section 404 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Sec. 1104. Finally, he argued that were the suspension legal, it could last only as long as he remained in business.

Both parties moved for summary judgment. The district court held that the Plan could not continue to suspend Harm's benefits if he closed his business,[1] but it found that the suspension would remain legal until then. The Plan did not appeal the court's holding on the length of benefit suspension, so that issue is not before us. The only issues are before us:

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[1]When Harm retired in 1977, the Plan only suspended benefits during the period of employment. The trustees amended it, effective January 1, 1979, to require suspension from a retiree's return to employment until he reached normal retirement age. The district court found the trustee's attempt to apply this provision retroactively unlawful under Brug v. Pension Plan, 669 F.2d 570 (9th Cir. 1982).

(1) Is the trustees' interpretation that Harm's business activities constituted "work" in the pipe trades industry arbitrary and capricious?

(2) Is a rule suspending the benefits of sole proprietors operating outside the Plan's geographic area in violation of section 404?

III.
STANDARD OF REVIEW

When reviewing the record in this case we engage in de novo review. For us to affirm the district court, we must be convinced that there is no genuine issue of material fact and that the Plan is entitled to summary judgment as a matter of law even when we review every conflict in the evidence most favorably to Harm. *See ILGW v. Sureck*, 681 F.2d 624, 628-29 (9th Cir. 1982); *Heiniger v. City of Phoenix*, 625 F.2d 842, 843 (9th Cir. 1980).

IV.
IS THE TRUSTEES' INTERPRETATION ARBITRARY?

In suspending Harm's benefits the trustees relied on article I, section 4 of the Plan, which prohibited service retirees from receiving benefits upon returning to "work" anywhere in the trades industry.[2] Section 16 of article I

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[2]This provision provides in part:

Section 4. Disqualification Upon Return to Work

It is intended that Normal or Early Retirement Benefits, or the Service Retirement Benefit, will be payable only to those Employees who retire from work in the Pipe Trades Industry. Therefore, any retired Employee who returns to such work shall be disqualified from the receipt of any retirement benefits during any month in which he performs such work. Such benefits will be discontinued as of the first of the month following his return to active employment as stated above.

Payment of retirement benefits, at the monthly rate in effect prior to his re-employment, will be resumed following submission of evidence satisfactory to the Trustees that the Employee has ceased employment.

defined "work" as including "all work, public or private, covered, or if not actually covered, of the type covered. . . , whether performed as an employee, supervisor, sole proprietor, member of an unincorporated firm, or officer of a corporation." Harm, while conceding that his employees performed work in covered employment, argues that he did not because he only hired and managed them. In his view section 16 should apply to sole proprietors only if they perform tasks in the union's work classifications.

He bolsters his position by arguing that we should weigh all doubts in interpretation against the appellee because it drafted the regulations. Standard rules of contract interpretation, however, do not apply in this case.[3] Instead, the Plan's interpretation must be sustained as long as it is reasonable. *See Smith v. CMTA-IAM Pension Trust,* 654 F.2d 650, 655 (9th Cir. 1981); *Gordon v. ILWU-PIMA Benefit Funds,* 616 F.2d 433, 439-40 (9th Cir. 1980). To overturn the Plan's reading of its rule, Harm must demonstrate that it is arbitrary and capricious or erroneous with respect to a question of law. *Smith,* 654 F.2d at 654-55; *Gordon,* 616 F.2d at 439-40.

This Harm had not done. The Plan cut off benefits for "all work . . . performed as (a) sole proprietor." Work "performed as a sole proprietor" standing alone would certainly encompass Harm's managerial activity. It is not limited to manual labor performed by a sole proprietor. The core of the functions that attach to a sole proprietor are

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[3]*See* Rehmar v. Smith, 555 F. 2d 1362, 1368-69 (9th Cir. 1976). Judicial scrutiny is limited to allow the trustees to play their role in pension fund administration. The need for federal law to override state law may not arise, however, when trustees interpret trust rules that govern their own position. *See* Culinary & Serv. Employees Union v. Hawaii Employee Benefit Administration, 688 F.2d 1228, 1230 (9th Cir. 1980) (applying standard rules of contract interpretation to rule governing appointment and removal of trustees.)

managerial. When faced with the similar problem of describing an employer working on jobs traditionally handled by employees, the Plumbers employed a new classification, "working employer," in its collective bargaining agreement. The Plan's failure to use similar language weighs heavily against Harm's position.

Harm argues that "performed as a sole proprietor," as used in section 16, must be subordinated to the preceding clause defining penalized work as "covered (or) of the type covered." When so subordinated, it would follow that only a retiree who "performed as a sole proprietor" in employment "covered (or) of the type covered" would lose benefits. This reading of the rule is implausible. Suspension for work "covered . . . or of the type covered" already encompassed all union and nonunion jobs in the work classifications. This covers the field if Harm's interpretation were accepted. There would be no need to add a separate clause stating "whether performed as an employee, supervisor, sole proprietor, member of an unincorporated firm, or officer of a corporation." These clauses must embrace something else. It is unlikely that their reach extended only to supervisors, sole proprietors, or corporate members or officers who occasionally wielded a wrench or laid a pipe. The Plan's position that work "performed as a sole proprietor" was designed to cover Harm's everyday business activities is reasonable.

V.

DOES THE RULE VIOLATE SECTION 404 OF ERISA?

Under section 404, as under the similar provisions of section 302 (c)(5) of the Labor Management Relations (Taft-Hartley) Act, *id.*, 186 (c)(5), trustees with the discretion to establish benefit provisions must act solely in the interests of "participants and beneficiaries." We have implemented

this requirement with the "structural defect" test. Under it rules that exclude employees from receiving benefits, for reasons which are arbitrary and capricious, violate section 404.[4] *Miranda v. Audia*, 681 F.2d 1124, 1125 (9th Cir. 1981); *Fentron Industries v. National Shopment Pension Fund*, 674 F.2d 1300, 1307 (9th Cir. 1982); *Brug v. Pension Plan*, 669 F.2d 570, 573-79 (9th Cir. 1982.) Moreover, our decisions have erected certain presumptions that trustees must refute to avoid the "arbitrary and capricious" brand. If a rule, for example, excludes a disproportionate number of employees from receiving benefits, we hold that the burden shifts to the trustees to show a reasonable purpose for the exclusion. *Miranda*, 681 F.2d at 1125-27; *Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 543-45 (9th Cir. 1980). Also a rule that denies pensions to employees who have worked a substantially greater time than others who received benefits also shifts the burden to trustees to show a rational connection between the rule and the fund's purposes. *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648, 655-56 (9th Cir. 1982). So too the trustees cannot adopt a rule that retroactively deprives employees of benefits without giving them an opportunity to comply with the new rule, *Burroughs v. Board of Trustees*, 542 F.2d 112, 1131 (9th Cir. 1976) or deprives them of vested benefits because of an involuntary break in employment, *Lee v. Nesbitt*, 453 F.2d 1309, 1311-12 (9th Cir. 1972).

Harms, however, does not persuade us that the Plans' suspension rule violated ERISA. It is true that the rule would allow unemployed service retirees with substantially less credited service than Harm to receive benefits, thus shifting

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[4]No claim is made that these rules were adopted in collective bargaining, so the standard of review in United Mine Worker v. Robinson, 102 S. Ct. 1226 (1982), does not apply.

the burden to the Plan to show a rational basis for the rule. The Plan, however, met this burden by showing a reasonable basis for suspending the benefits of *all* employed service retirees. As both its actuary and the co-chairman of the trustees stated, the Plan funded service retirement on the assumption that most retiree who did not was heavy. Harm and his spouse, under his interpretation, would be entitled to $141,557 in service retirement benefits without regard to the locations of his employment. This was more than the $128,848 the Plan anticipated paying Harm in normal retirement benefits, and greatly in excess of the $19,703.02 that Harm's employers had paid into the Plan for him. These excess benefits would have come largely from the stepped-up contributions of current participants. Thus the Plan's suspension of Harm's benefits was not arbitrary or capricious.

Harms alleges that his loss of benefits was illegal because "(t)he Plan has offered no grounds showing how HARM's employment in Nevada . . . . caused the PLAN, the Locals, or the contributing employer any prejudice or damage." This is not so. As already indicated, Harm's move to Nevada did not reduce the financial burden on the Plan; the relationship between prior payments into the Plan for Harm and his benefits remained the same. The Plan was therefore justified in treating him in the same manner as it did other working service retirees.[5] The Plan did not have to pay him when it did not pay all employed service retirees. The alleged differences in impact on the Plan's contribution base between Harm's employment without the Plan's geographic area and that of retirees within the area does not invalidate

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[5]Harm did fare differently from service retirees who worked as employees; their normal retirement benefits, unlike his, increased as they continued to work. This is only an apparent inequality however, because Harm was freed from having to pay the contributions that would fund his increased benefits.

the rule.[6] *See Wilson v. Board of Trustees*, 564 F.2d 1299, 1302 (9th Cir. 1977).

Nothing in *Elser* requires us to impose a heavier burden on the trustees. In *Elser* the trustees sought to defend their cancellation of the past service credits of employees whose employer had withdrawn from the fund. The trustees claimed that their action was needed to avoid excessive unfunded liability. Faced with this justification, the court required them to show "that the forfeiture provisions were necessary to protect that financial soundness of the Fund." 684 F.2d at 658 & n. 18 (emphasis added.) The court found for the employees after it discovered the the trustees had never calculated their unfunded liability, and that there were other ways to meet their obligations. *Elser's* approach should be read in light of the standard of review set out in *Ponce*, which held that once a plaintiff establishes the existence of a structural defect, "the burden shifts to the trustees to show the reasonableness of the requirement." 628 F.2d at 543; *see, e.g., Miranda*, 681 F.2d at 1126-27. Although we described the burden that shifts as the burden of proof, 628 F.2d at 543-44, the trustees can meet this burden by showing "any reasonable basis" for their action, *see id.*, at 542.

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[6]The Plan offers two reasons to reject Harm's argument this his employment, unlike that of retirees in the Plan's geographic area, could not affect its contribution base. First, he might displace migrating employees whose employer sent contribtions back to the Plan under its "home" policy. Second, its enforcement of its rule could encourage other plans to enforce similar rules, thus preventing an influx of employees into the Plan's area and increased competition for jobs with contributing employers. We do not address these arguments because we find the Plan's financial justification adequate to support its rule.

This has been done in this case.[7]

Harm's other arguments can be disposed of quickly. Deference to the Department of Labor regulation in 29 C.F.R. Sec. 2530-203-3 (a) (1981) neither determines our decision nor did it that of the district court. Harm's view that he is entitled to benefits under ERISA because "the primary reasons for ERISA (is guaranteeing) a retiree that he receive his pension benefits as promised after years of qualifying service" does not entitle him to benefits here. Congress has never envisioned, either in ERISA or the Taft-Hartley Act, a one-to-one correspondence between payments and benefits. *See Elser*, 684 F.2d at 655-56; *Ponce*, 628 F.2d at 542-42. ERISA's focus is on normal retirement. It would prevent a suspension were Harm of normal retirement age, *see* section 203 (a), 29 U.S.C. Sec. 1053 (a), but it has left

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[7]Only some decisions need be shown "necessary to protect the soundness of the Fund." If, as *Elser*, the only explanation offered for a change in benefits is that it was compelled by financial necessity, there must be some evidence that such is the case. Other rules may represent a choice among competing policies or rely on behavioral predictions that are not susceptible to verification. In this latter group are that break-in-employment rules, which rest on the trustee's prediction that employees will be encourages to seek continuing employment in the industry, selection or matching of actuarial probabilities to the conditions of an industry fall more fully to the trustees' discretion. *See* Souza v. Trustees of Western Conference, 633 F.2d 942, 946-47 (9th Cir. 1981); *Ponce*, 628 F.2d at 542; *Wilson*, 564 F.2d at 1302. The trustees can act in these areas without a showing of financial necessity.

The *Elser* court also cited Center Tool Co. v. I.A.M. Nat'l Pension Fund, 523 F. Supp. 812, 817 (D. D. C. 1981), which held that a plan's trustees had to accomplish any reduction in benefits following employer termination by the least drastic means. 684 F.2d at 657. In *Central Tool*, however, the plan agreement itself required that benefits be reduced only "to the extent necessary." *See id.*, at 657 n. 16. Neither *Elser* nor *Central Tool* should be reasonable alternatives in deciding the scope of a rule. *See Wilson*, 564 F.2d at 1302.

open such suspension for service or early retirees.[8] A graduated vesting of benefits that would achieve the result Harm desires may have advantages, *see* H.R. Rep. No. 533, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4644, but Congress did not adopt such a scheme. The Plan has not deprived Harm of any *normal* retirement benefits. ERISA guarantees no more.

AFFIRMED.

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[8]Harm does not raise this issue on appeal, although he contested it below. In any event, section 203 (a) only governs normal retirement benefits, see Hernandez v. Southern Nevada Culinary & Bartenders Pension Trust, 662 F.2d 617, 619-20 (9th Cir. 1981);Hurn v. Retirement Fund Trust, 648 F. 2d 1252, 1353-54 (9th Cir. 1981); it does not affect the outcome of this case.

Ellis M. Hurn, Plaintiff-Appellant, vs. Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California, Defendant-Appellee.

No. 82-5032.

United States Court of Appeals for the Ninth Circuit

[Filed on April 4, 1983]

Appeal from the United States District Court for the Central District of California.

A. Andrew Hauk, District Judge, Presiding. Argued and Submitted October 7, 1982.

Before: SNEED and ALARCON, Circuit Judges, and CORDOVA*, District Judge.

SNEED, Circuit Judge:

Appellant Ellis Hurn is a retired member of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry. His case has been before us once before. In his first complaint he alleged that the Retirement Fund Trust's suspension of his pension benefits violated the vesting provisions in section 203(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. sec. 1053(a). The district court granted the Fund summary judgment on that claim because Hurn did not meet the normal retirement age of sixty-five, a prerequisite for ERISA nonforfeitability. On appeal we agreed with the court on section 203(a)'s inapplicability, but remanded the case to allow Hurn to file an amended complaint under section 302(c)(5) of the Labor Management Relations (Taft-Hartley Act), 29 U.S.C. sec. 186(c)(5). *Hurn v. Retirement Fund Trust*, 648 F.2d 1252, 1254-55 (9th Cir. 1981). Hurn's second complaint fared no better. On cross-motions for summary judgment, the district court again granted the Fund's motion. We again reverse.

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*Honorable Valdemar A. Cordova, United States District Judge for the District of Arizona, sitting by designation.

I.
STATEMENT OF FACTS AND ISSUES

Hurn began to receive an early retirement service pension in June 1975. He was fifty-eight years old, and had accumulated twenty-five years of credit under the Fund's service retirement plan. On December 1, 1975, he accepted nomination for the presidency of his local, a nonpaying office. He alleges that the local's incumbent business manager, whose opponent Hurn supported, threatened to suspend his pension if he ran for office. He ran anyway, and although he was not elected, the Fund's trustees voted to suspend his benefits from February 1, 1976 to the beginning of October.

Hurn's dispute with the Fund is over the legality of the suspension. Fund Rule 21 dictated suspension for anyone engaging in "employment of activity," including "labor relations," in the building and construction industry. The Fund argues that the Rule encompassed nominees for union office. Hurn, of course, claims that the Rule did not. He also argues that a rule suspending nominees' pension benefits would be arbitrary and capricious, in violation of the fiduciary duties imposed on Fund trustees by section 302(c)(5). Furthermore, he claims that the trustees failed to provide adequate notice of the Rule's content and discriminated in its application, both also in violation of section 302(c)(5).

We shall address only one of these issues, *viz.*, whether Rule 21 as interpreted and applied by the Fund trustees was arbitrary and capricious and thus in violation of section 302(c)(5). Inasmuch as we hold that it was, it is not necessary for us to address Hurn's other arguments. We will assume, *arguendo*, that Rule 21 encompassed nominees for union office and that the Fund gave adequate notice of its contents and did not discriminate in its application.

II.
REVIEW PURSUANT TO SECTION 302(c)(5)

The Taft-Hartley Act governs the trustees' discretion in structuring pension rules. Section 302(c)(5) requires trustees to act "for the sole and exclusive benefit of the employees."[1] This section imposes on trustees the burden of fiduciary care, as defined on traditional equitable principles. *NLRB v. Amax Coal Co.* 453 U.S. 322, 330 (1981). Each trustee bears an "unwavering duty of complete loyalty" to employees, *id.* at 329, and this duty "to trust beneficiaries must overcome any loyalty to the interest of the party that appointed him," *id.* at 334.

A. The Standard of Review for Rules Established in Collective Bargaining Is Inapplicable

We acknowledge our holding would be otherwise had the details of the Fund been worked out in collective bargaining. The Supreme court held in *UMW Health & Retirement Funds*

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[1]Section 302(a), 29 U.S.C. sec. 186(a), prohibits employers from making payments to employee representatives, labor organizations, employees if in excess of normal compensation and designed to influence collective bargaining, or officers or employees of a labor organization if with the intent of influencing their actions. Section 302(c)(5) creates an exception for payments for employee representatives:

> (W)ith respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefits of the employees of such employer,** . . . . *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, . . . ; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon . . .; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

*(Emphasis added).

v. Robinson, 455 U.S. 562 (1982), that benefits determined in collective bargaining can be overturned only if in violation of other federal law. *See id.* at 575-76. Variations in benefits in such plans are presumed to be the product of a give and take in which all parties, including the beneficiaries, are represented. The Fund insists that its rules are eligible for protection under *Robinson*. We do not agree.

In *Robinson* the Court distinguished provisions that had been the " 'subject of explicit, informed and intense bargaining,' " *id.* at 569 (quoting the district court's unpublished opinion), from those estabished by trustees with " 'full authority' to determine eligibility requirements and benefit levels," *id.* at 573. The union and mine operators in *Robinson* had reached an impasse during collective bargaining over rules governing widows' health benefits, and the final provisions were a compromise designed to end a strike. *See id.* at 567. There was every reason to believe that each side had explored the advantages and disadvantages of the alternatives before agreeing on the rules finally adopted. The Court, in shutting off inquiry into the reasonableness of these provisions, noted that "(a)s long as such conditions do not violate federal law or policy, they are entitled to the respect as any other provision in a collective bargaining agreement." *Id.* at 575.

Nothing in the record suggests that Rule 21 was established in collective bargaining. The trustees enjoyed the initiative on changes in the Fund. The formulation and pre-0.5drafting debate over all rules, including Amendment No. 36-A, which amended Rule 21 to make it embrace "employment or activity" including "labor relations," was their responsibility. Rules did have to be ratified by union and employer representatives before they could be adopted by

the trustees. Independent approval by representatives of each side, however, is not the equivalent of collective bargaining. *Robinson*, therefore, is inapplicable.[2]

B. The Arbitrary and Capricious Standard of Review for Discretionary Rules

Our authority to review Rule 21's scheme of distribution, as interpreted by the trustees, is limited to what can be implied from section 302(c)(5)'s mandate that trust rules be in the "sole and exclusive benefit" of employees.[3] To implement section 302(c)(5)'s mandate while respecting the trustees' need for discretion in conceiving a plan to maximize employees welfare, we have traditionally reviewed trust rules to ensure that they are not arbitrary and capricious, unsupported by substantial evidence, instituted in bad faith, or erroneous on a question of law. *See Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1977) (endorsing standard in *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962)); *see, e.g., Elser v. I.A.M. National Pension Fund*, 684 F.2d 648, 654 (9th Cir. 1982); *Miranda v. Audia*, 681 F.2d 1124, 1125 (9th Cir. 1982); *Brug v. Pension Plan*, 669 F.2d 570, 573-74 (9th Cir.), *cert. denied*, 103 S. Ct. 135 (1982).

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[2]The trust agreement in *Robinson* read as if it gave the trustees some discretionary authority, *see 455 U.S. at 574 n.13, but the Court interpreted it to require them to adhere to the collective bargaining contract "unless modification is required to comply with applicable federal law," id.* The specific rules contested in *Robinson* were the product of collective bargaining, not trustee initiative, and we understand *Robinson* to apply only in such situations.

[3]Authority for review under sec. 302(c)(5) is well established in this circuit, even if its basis remains implicit. In the lead case of Alvares v. Erickson, 514 F.2d 156 (9th Cir.), *cert. denied*, 423 U.S. 874 (1975), we noted the inconclusiveness of the legislative history of sec. 302(c)(5) if looked to as a guide to our jurisdiction. *Id.* at 164. We took jurisdiction not from our inherent equitable power but from the " 'penumbra of express statutory mandate' " of section 302(c)(5). 514 F.2d at 166 (quoting Lugo v. Employees Retirement Fund, 366 F. Supp. 99, 103 (E.D.N.Y. 1973).

Under the "structural defect" test, an employee can show violation of these standards by establishing the exclusion of a large number of employees from benefits for no apparent reason. *Burroughs v. Board of Trustees*, 542 F.2d 1128, 1131 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977). The trustees will still prevail if they show a reasonable purpose for their rule. *See Miranda*, 681 F.2d at 1125-27; *Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 543-45 (9th Cir. 1980).[4]

Violations of the trustees' fiduciary duties may be easiest to see when a group of employees are deprived of benefits, but the structural defect test is not limited to group violations. The test extends to rules that arbitrarily exclude individual employees from their chance at benefits. Thus we have invalidated break-in-employment rules that retroactively cancel past service credit, *Burroughs*, 542 F.2d 1131; *see also Brug*, 669 F.2d at 575-76 (recission of amendment making clerical employees beneficiaries arbitrary and capricious as applied to employee otherwise eligible for benefits at time of recission), or divest otherwise vested benefits because of an involuntary break in employment, *Lee v. Nesbitt*, 453 F.2d 1309, 1311-12 (9th Cir. 1972). Rules that deny individual employees benefits for reasons irrational on

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[4]The results of the break-in-employment rules illustrate the broad latitude this approach accords trustees' policy selections and the rules they adopt to meet their goals. *See, e.g.*, Sailer v. Retirement Fund Trust, 599 F.2d 913, 914-15 (9th Cir. 1979) (employee whose only disqualification from benefits was failure to file notice requesting waiver of break-up-employment rule not entitled to benefits); Wilson v. Board of Trustees, 564 F.2d 1299, 1301-02 (9th Cir. 1977) (employee with over sixteen years of employment at contribution date, who would have qualified then if older, disqualified twelve years later because nine hours short of break-in-employment minimum); Giler v. Board of Trustees, 509 F.2d 848, 849 (9th Cir. 1975) (per curiam) (employee with seventeen years in pension credit at age fifty ineligible for benefit at age because of break in employment after accumulation of seventeen years of credit).

their face are also inconsistent with the trustees' obligation to administer the trust in the "sole and exclusive benefit" of all employees. The trustees must advance some reason for such rules to surmount the arbitrary and capricious barrier.

C. Application of the Arbitrary and Capricious Standard

The Fund has advanced no such reason. It presents the Rule as "part of an overall regulatory program designed to meet a series of problems and issues." It does not identify these problems and issues, but it claims that they are similar to those that justify suspension of the benefits of employed service retirees or retirees who seek employment by registering in a hiring hall or taking out a state contractor's license. These latter provisions, of course, are not arbitrary. The Fund has a clear interest in not paying benefits to early retirees employed in the industry; they already receive a full income, and the Fund does not want them to compete for jobs with younger workers ineligible for benefits. And it is not arbitrary to cast Rule 21 so as to reach those seeking to return to work. Not all rules that reach somewhat beyond their mark are for that reason unlawful. *See Wilson v. Board of Trustees*, 564 F.2d 1299, 1302 (9th Cir. 1977).

The Fund's interest in protecting the jobs of young workers and its contribution base, however, does not require it to penalize retirees who run for the union's presidency. The union does not pay its president or contribute to his retirement benefits, so Hurn would not affect anyone's job, wage, or benefits by winning office. The Fund therefore had no reason to discourage his candidacy. Nor was Hurn any less needy than before running for office. He needed his benefits, if anything, more than before because he now had the expense of campaigning to add to his other expenses. His need for benefits during his campaign would not have been re-

duced even were the presidency a paying office.

We also find unsupported on this record the view that competition from retirees might deter other union members from seeking office. Employed workers who run for office would not lose their wages in the process, so they should not fear competition from service retirees. The only certain effect of suspension is to add to the disincentives retirees like Hurn have for seeking union office. We express no opinion on the lawfulness of a complete bar of a retiree from holding union office. *See* 29 C.F.R. sec. 451.41(a) (1982). Even if such a bar were lawful the disincentive Rule 21 is said to embody would remain arbitrary because it would bar only those who could not afford to lose their benefits. Those who could afford that loss could continue to seek and to hold union office. Such discrimination would be arbitrary. Therefore, we find the provision arbitrary and capricious under section 302(c)(5).

D. ERISA Preemption and the Taft-Hartley Act

Finally, there is no merit to the Fund's objection that we cannot reach the Taft-Harley violation because we have already validated the pension plan under ERISA's "conflicting" standards. That is not true. All that we decided in our earlier opinion was that Hurn did not meet the age requirement for the nonforfeitability standards in ERISA section 203(a). 648 F.2d at 1253-54. Section 203(a) primarily effectuates only one of Congress' goals, that of establishing "minimum standards of plan design with respect to the vesting of plan benefits." *See* H.R. Rep. No. 533, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4640,[5] We did not authorize the trustees

[5]For a summary of ERISA's other provisions, see *The Pension Reform Act of 1974: Brave New World of Retirement Security*, 27 U. Fla. L. Rev. 1004, 1064-79 (1979).

to behave arbitrarily in dispensing nonvested benefits. Had we thought otherwise we would not have remanded the case to the district court to allow Hurn to pursue his section 302(c)(5) claim.[6]

The Fund's broader argument that ERISA preempts the Taft-Harley Act on pension issues is equally untenable. Both the Supreme Court and this court have recognized that the Taft-Hartley provisions parallel the ERISA provisions and that trustees must meet the requirements of each. *See UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982); *Bricklayers' Health & Welfare Trust Fund v. Brick Masons' Health & Welfare Trust Fund*, 656 F.2d 1387, 1392, (9th Cir. 1981); *Gordon v. ILWU-PMA Benefit Funds*, 616 F.2d 433, 438 (9th Cir. 1980); *cf. NLRB v. Amax Coal Co.*, 453 U.S. 322, 332-34 (1981) (using "language and legislative history of sec. 302(c)(5) and ERISA" to define trustees' duties). Where Congress intended ERISA to repeal or supersede other laws, state or federal, it said so. *See* 29 U.S.C. sec. 1031(a), 1144(a). But it said nothing about section 302(c)(5). ERISA was not to affect any federal laws not specifically mentioned, *id.* sec. 1144(d), and it does not preempt Hurn's Taft-Hartley claim.

Summary judgment for appellee is reversed, and the case is remanded to the district court for entry of judgment consistent with this disposition.

REVERSED and REMANDED.

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[6]The district court in its second opinion advanced the view the Fund takes here, that "(T)he Rules and Regulations of Defendant Fund in issue in this case have been held not to violate the provisions of (ERISA) in *Hurn v. Retirement Fund*, etc., 648 F.2d 1252 (9th Cir. 1981)." The court construed our earlier opinion too broadly. We only held that Rule 21 did not violate sec. 203(a). We said nothing of other ERISA provisions, most notably sec. 404, 29 U.S.C. sec. 1104, the analogue to sec. 302(c)(5). We do not discuss the applicability of sec. 404, which took effect on January 1, 1975, *id.* sec. 1114(a), and carries its own limitations period, *id.* sec. 1113, because Hurn did not plead a cause of action under it.